

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 649 of 1980

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.PARIKH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES
 2. To be referred to the Reporter or not? : YES
 3. Whether Their Lordships wish to see the fair copy of the judgement? : NO
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO
 5. Whether it is to be circulated to the Civil Judge? : NO

KANAIYALAL M PANCHAL

Versus

HEIRS OF MANGALABEN, WD/O BHALABHAI ISHWARBHAI

Appearance:

MR SB VAKIL for Petitioner
MR SR DIVETIA for Respondent No. 1

CORAM : MR.JUSTICE M.S.PARIKH

Date of decision: 29/06/2000

ORAL JUDGEMENT

This appeal arises from the impugned judgment and decree passed by the learned Judge, Ahmedabad City Civil Court, Court No. 8, on 21.12.1979 in Civil Suit No. 1173 of 1976. The appellant herein was the plaintiff in the suit and the respondents' predecessor Mangalaben

was the defendant in the suit. The parties will be described as the plaintiff and the defendant respectively.

The plaintiff filed suit for partition and separate possession of his share in the property described in Para-11 of the plaint known as "Mangala Sadan" (suit property) and for accounts, the defendant being the widow of Bhalabhai Ishwarbhai, who died intestate on 31.8.1974. The plaintiff claims half share in the suit property on the basis of the oral gift made by his uncle Bhalabhai Ishwarbhai in his favour as well as in favour of his aunt on or about 28.1.1958 and also on the basis of adverse possession since that date. The defendant, who happened to be the sole heir to the estate of the deceased Bhalabhai, denied the claim of the plaintiff as per written statement exh. 25. According to her, the alleged gift was never acted upon by deceased Bhalabhai till his death and herself after his death enjoyed the income of the suit property. According to her, the possession of either of the parties never became adverse to deceased Bhalabhai.

The plaintiff asserted that after mutation of entry was effected on 28.1.1958, he alongwith the defendant as the co-owner and co-donee had been exercising title of the suit property as the owner lessors and the rental income was also credited in Bank account jointly operated by both. The rent receipts were issued in the joint names and the rent was collected by the plaintiff for more than 12 years. He accordingly claims title to the suit property by adverse possession. In reply, the defendant's stand was that it was only an arrangement for collection of rent and administration of the property of the deceased for the sake of convenience and no part of the rental income of the property has even been enjoyed by the plaintiff in assertion of his right as owner by adverse possession.

It is an admitted position that the entire suit property is in occupation of tenants and neither the deceased nor the parties have ever been in actual possession of the suit property or any part thereof.

On the aforesaid pleadings, the learned trial judge framed issues at Exh. 45, which read as under:

- 1) Is it proved that the suit property described in plaint para-11 is of the joint and equal ownership of the plaintiff with the defendant, either as a result of oral gift or by adverse

possession, as stated in plaint para-2?

2) Whether the plaintiff is entitled to partition of the suit property ?

3) What decree and order ?

The aforesaid issues have been answered in the negative resulting into the dismissal of plaintiff's suit. That is how, the plaintiff is before this court in this appeal

Mr SB Vakil, learned counsel appearing for the plaintiff canvassed the case of the plaintiff. He placed reliance upon exh. 67 for submitting that the plaintiff was in possession of the portion of the suit property consequent upon the said document. He, however, fairly submitted that the plaintiff conceded before the trial court that no title could be conferred by a Hindu by way of oral gift in view of section 123 of the Transfer of Property Act, 1882. Section 123 would read as under:

Section-123: Transfer how effected.-For the purpose of making a gift of immoveable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses.

For the purpose of making a gift of moveable property, the transfer may be effected either by a registered instrument signed as aforesaid or by delivery.

Such delivery may be made in the same way as goods sold may be delivered.

It might be noted from the aforesaid provision that a gift of the immoveable property could be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses. In the present case, admittedly, there is no registered gift, but plaintiff produced a statement exh. 66 made by the deceased Bhalabhai before the City Survey Officer requesting the said officer to mutate the names of the plaintiff and defendant in his place under oral gift. The plaintiff also produced joint statement exh. 67 made before the said officer by both the donees, accepting the gift and taking possession of the suit property as donees. The learned trial judge has observed that these

documents by themselves cannot affect the suit property and cannot be used as evidence of any transaction affecting the said property under the provisions of Sec. 49 of the Indian Registration Act. Mr. Vakil, however submitted that this piece of evidence can be used for collateral purpose, in order to appreciate the evidence with regard to subsequent conduct of the parties on the question of adverse possession. The plaintiff relied upon rent receipts exh. 56, exh. 61 to exh. 64, certified extract from property Register exh. 39 coupled with certified extract from the Municipal Assessment book exh. 34. The plaintiff also relied upon exh. 34 being the evidence from the Bank for showing that there was a joint account operated in Dena Bank, Delhi Chakla Branch, Ahmedabad. The plaintiff also examined tenants of the suit property namely Botharam exh. 55, Dineshkumar exh. 59 and Dalsukhbhai exh. 65.

Botharam exh. 55 has stated that he was inducted as a tenant in Mangala Sadan in November, 1960 by the plaintiff, who claimed to be co-owner with the defendant. He has also stated that the rent was collected by the plaintiff as well as by Dilipkumar and Arunkumar (DW-2; exh. 76). Dineshkumar exh. 59 has not supported the plaintiff at all. He has stated that the defendant let out the premises in suit property to him and there has been no change of ownership thereof since then. He has, however, stated that in the beginning the plaintiff was collecting the rent but later on it was collected by Arunbhai exh. 76 and Dilipbhai also used to collect the rent. The third tenant, Dalsukhbhai exh. 65, has not supported the plaintiff. He admitted that he did not pay any rent to the plaintiff since 1970. According to him, he had met defendant Mangalaben before the premises were let to him and the rent was fixed by her. At that time, the plaintiff was also present. In this back ground, the plaintiff deposed that since 1959 he was administering the suit property and collecting the rent thereof and depositing the same in Dena Bank. He deposed that till 1965 he was collecting the rent and paying it to the defendant after deducting the expenses. He admitted that since 1965, he did not collect any rent. According to him, the rent collection was entrusted to his cousins Dilipkumar and Arunkumar exh. 76. He however asserted that they paid the collected rent to him and he, in turn, paid that amount to the defendant. He has however been contradicted by Arunkumar exh. 76 who testified that he never paid any rent to plaintiff. The learned trial judge has believed Arunkumar exh. 76 when he deposed that he never paid any rent to plaintiff, since this witness was corroborated by plaintiff's own witness

Dalsukhbhai stating that he never paid any rent to the plaintiff. In any event, plaintiff has admitted that he used to pay the entire amount of rent to the defendant or Bhalabhai. The learned trial judge has reproduced portion of his cross-examination where his admission has been recorded. According to this admission, he rendered all the accounts of the suit property to Bhalabhai till up to 31.8.1974 and for the period between 1958 to 1979, he did not have any evidence to show that he received any amount as a result of settlement of any account. Referring to his pleading, the learned trial judge has observed that the plaintiff used to collect the rent of the suit property and used to pay the same to Bhalabhai during his life time. Learned trial judge has also observed from the evidence of plaintiff that he used to pay the rent to the defendant after the death of Bhalabhai. Referring to the evidence so discussed by the learned trial judge, the learned counsel for the plaintiff has fairly conceded that there was little evidence to show that the plaintiff retained any amount of rent with him so as to show his constructive possession of half the share of the suit property. The learned trial judge has proceeded to deal with the legal position flowing from the decisions in the case of Abdul Kadir vs. Umma, reported in I.L.R. (1970) II p. 639 and in the case of Shambhuprasad vs. Phoolkumari, reported in A.I.R. 1971 S.C. 1337. It has been observed that in the case of an ouster of a co-owner, the position is essentially different. It must be brought to the knowledge of the co-owner that his rights are invaded in open assertion of hostile title. To constitute ouster, there must be something more than mere exclusive possession and receipt of income etc. Adverse possession has to have characteristics of adequacy, continuity and exclusiveness.

Having gone through the evidence adduced before the trial court and having gone through the observations of the learned trial judge on the said evidence, I am of the opinion that merely because some statements were made before the City Survey Officer as per Exh. 66 and 67, the same could hardly support the cause of the plaintiff even for collateral purposes to show the adverse possession. The submission that subsequent evidence should be treated to get colour from exh. 67 cannot be accepted because the subsequent evidence as noted above, runs counter to the statement exh. 67. The subsequent conduct/subsequent evidence on the part of the parties, more particularly the plaintiff, would go to indicate that the plaintiff did not have any occasion to retain any portion of the rent collected during the course of

time. On the contrary, the plaintiff did not have any evidence to show that he had got any share of the rental income or that he had retained any portion of the rental income during the course of time. In that view of the matter, the submission of Mr. Vakil with regard to appreciation of evidence in the context of exh. 67 cannot be accepted.

In the result, this appeal fails. The same is dismissed with no order as to costs.

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